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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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JUN 27 1997

In the Matter of )  
 )  
Amendment of Rules and Policies )  
Governing Pole Attachments )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
CS Docket No. 97-98

**JOINT COMMENTS OF  
BELL ATLANTIC AND NYNEX**

Edward D. Young III  
Of Counsel

Betsy L. Anderson  
1320 North Court House Road  
Eighth Floor  
Arlington, VA 22201  
(703) 974-6348

Attorney for the  
Bell Atlantic Telephone Companies

Robert P. Slevin  
1095 Avenue of the Americas  
Room 3731  
New York, NY 10036  
(212) 395-6390

Attorney for the  
NYNEX Telephone Companies

Dated: June 27, 1997

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BELL ATLANTIC<sup>1</sup> AND NYNEX<sup>2</sup>**

**I. Introduction and Summary**

In this proceeding, the Commission seeks comments on proposed modifications to the Commission's rules for determining the maximum permissible rates for pole attachments and conduit access in those jurisdictions where the Commission's rules are applicable,<sup>3</sup> pending the Commission's adoption of the new rate formula required by the Telecommunications Act of 1996.<sup>4</sup>

Bell Atlantic and NYNEX support certain modifications to the formula proposed by the Commission to improve its accuracy, including use of a gross, rather than net, book cost methodology in the rate formula, and adoption of the Part 32 accounts

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<sup>1</sup> The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C. , Inc., and Bell Atlantic-West Virginia, Inc.

<sup>2</sup> The NYNEX Telephone Companies ("NYNEX") are New York Telephone Company and New England Telephone and Telegraph Company.

<sup>3</sup> The FCC's pole attachment rate formula governs only disputed rates between parties in those states in which the state public service commission has not asserted jurisdiction over the rates, terms and conditions for such attachments in accordance with 47 U.S.C. Section 224(c).

<sup>4</sup> 47 U.S.C. Section 224(e)(1).

identified in Appendix B of the Commission's Notice of Proposed Rulemaking (NPRM).

The Commission should further modify the rate formula to (1) use gross, rather than net, pole book costs in calculating depreciation expenses; (2) use gross plant, rather than net plant, in calculating administrative carrying charge rates and in apportioning property taxes; (3) use the statutory federal income tax rate rather than federal income taxes paid in calculating the tax carrying charge and rate of return; and (4) include, rather than exclude, pole rental expense in Account 6411 costs.

The Commission should also adopt the current authorized interstate rate of return (11.25%) as the presumptive rate of return, subject to a showing by the incumbent local exchange carrier or utility that a different risk-adjusted cost of capital is more appropriate. In order to ensure that the costs of these facilities are borne by the appropriate cost causer, Bell Atlantic and NYNEX also urge the Commission to assign the 40-inch NESC safety space to electric utilities' usable space. The Commission should reject the additional rate formula modifications proposed by the electric utility companies.

Finally the Commission should adopt its proposed conduit rate formula using gross, rather than net, book costs, and should consider adding a utilization factor.

## **II. The Commission's Pole Attachment Rate Formula Should Use Gross, Rather Than Net, Book Costs**

In the NPRM initiating this proceeding, the Commission recognized that the current formula, which is based on net book costs, may result in unusually low or even negative pole attachment rates. That is because accumulated depreciation balances

under the current formula may exceed gross pole investment, yielding a negative net pole investment.<sup>5</sup> In order to address this issue, the Commission should adopt the gross book cost methodology<sup>6</sup> outlined in paragraph 29 of the NPRM, which includes accumulated depreciation in the poles' original cost, as a basis for calculating pole attachment rates.

The modified gross book cost approach more fully ensures that the Commission's pole attachment rate formula will meet the statutory mandate that attachment rates be "just and reasonable."<sup>7</sup> As the Commission noted, Southwestern Bell and US West are already experiencing net negative pole investment in areas where the accumulated depreciation in the pole account has grown to exceed the net investment of the account.<sup>8</sup> Bell Atlantic is experiencing the same problem in the District of Columbia. Given the high cost of pole removal -- a result of the inevitable inflation of labor rates over a pole's long life span and the environmental costs associated with disposal of chemically treated poles, other companies will face the same issue in the near future. As SWB observes, the cost of removal for its pole investment far exceeds its salvage value, resulting in a substantial negative net salvage value.<sup>9</sup> As the Commission has noted, "[b]ecause [its] pole attachment formula applies percentages for the carrying charge

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<sup>5</sup> Notice of Proposed Rulemaking, ¶¶ 12-16 (rel. Mar. 14, 1997) ("NPRM").

<sup>6</sup> The Commission's proposed gross book methodology does require that "rate of return and the income tax carrying charges...continue to be computed using net book costs." NPRM, ¶ 29, n. 63.

<sup>7</sup> 47 U.S.C. Section 224(b)(1).

<sup>8</sup> See Southwestern Bell Telephone Company, Computation of Rates for Attachment of Cable Television Hardware to Utility Poles, Petition for Clarification, or in the Alternative, a Waiver of Southwestern Bell Telephone Company, AAD 94-125 (filed Aug. 26, 1994) at 2-3 ("SWB Petition"); US West Comments, AAD 94-125 (filed Dec. 12, 1994) at 2, n. 5.

<sup>9</sup> SWB Petition at 2.

factors to the poles' net investment, a negative net salvage value could result in negative or unusually low pole attachment rates."<sup>10</sup> Adopting the gross book methodology for all local exchange carriers where the FCC's pole attachment rate formula is applicable will alleviate that result now and prevent the problem from recurring in the future.

The gross book approach also has significant advantages over the adjusted net book alternative proposed in the NPRM. First, it is simpler to administer and more predictable because the gross book cost methodology would uniformly govern all pole attachment rates. In contrast, the proposed adjusted net book methodology would require changes in the rate formula to be applied only after the net asset balance for poles has become negative. As a result, attaching entities would see their pole attachment rates decline initially and then increase significantly and unexpectedly as the net asset balance for that particular account turns negative.<sup>11</sup> Such rate fluctuations complicate financial planning by attaching entities and is more likely to generate rate disputes than would the rates produced by consistent application of the gross book cost methodology. In addition, attaching entities would have the ability to review public ARMIS data in order to verify the gross book costs underlying the calculations, which would also substantially reduce concerns that could lead to rate disputes. Finally, the Commission itself recognizes the difficulties inherent in net book cost calculations and subsequent

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<sup>10</sup> NPRM, ¶ 16.

<sup>11</sup> The Commission concludes erroneously that making the rate adjustment when the net asset balance turns negative would mean that rates would "eventually rise to a more consistent level over time after the proposed adjustment is made." NPRM, ¶ 25. To the contrary, rates would rise abruptly at the time the adjustment is made, rather than rising gradually over time.

adjustments.<sup>12</sup> The Commission should therefore adopt its proposed gross book cost methodology, rather than its proposed net book cost methodology, in order to ensure just and reasonable pole attachment rates.

### **III. Additional Changes to the Pole Attachment Rate Formula are Appropriate**

The Commission proposes to revise its pole attachment formula to reflect the new Part 32 accounts, which replaced the Part 31 accounts used in the original formula, and to adopt certain changes to improve its accuracy. Bell Atlantic and NYNEX concur with the Commission's proposed mapping to Part 32 accounts and support the adoption of those revisions.

The Commission should also make additional modifications to its proposed pole attachment rate formula, whether it adopts the gross or the net book cost methodology. First, it should multiply the depreciation rate by gross pole book cost, not net pole book cost, to avoid significantly reducing the proper depreciation expense of the pole account. Indeed, the current rate formula recognizes that problem and addresses it by applying the depreciation to gross plant value. The Commission should continue that practice.<sup>13</sup>

Second, the formula should apportion property taxes using gross plant, rather than net plant. The proposed adjusted net book cost formula would apply net plant weighting to taxes on the ground that income taxes are related to income, which is

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<sup>12</sup> NPRM, ¶ 28.

<sup>13</sup> See NPRM, ¶ 15 ("The depreciation rate determined by [the current] formula is applied to the gross plant value").

related to allowable return, which in turn is a function of net plant. As the Commission itself acknowledges, this relationship does not hold for non-income taxes.<sup>14</sup> If net plant weighting were used to allocate both income and non-income taxes, it would significantly reduce the recovery of property taxes. This is a particular concern for carriers who operate in states, like New York, where property taxes are a substantial part of total taxes. The correct approach is to separate out property taxes and then divide only by those plant investments to which the taxes apply.

Third, excluding pole rental expense from Account 6411 is inappropriate. The rent paid to others for the use of their pole facilities, just like the cost incurred to purchase poles, is a legitimate and prudent expense. By attaching to poles installed by others where possible, the LEC's overall costs may be lower than if it owned and maintained all of its own poles. These expenses are appropriately assigned to Account 6411 under the Commission's rules, and should not be excluded from the rate calculation. The Commission's concern that inclusion of such expenses could result in a double payment to the LEC is better addressed by excluding all pole attachment fees in the calculation of revenues, which would, in effect give attaching entities a credit for these fees.

Fourth, the administrative carrying charge rate should be calculated using gross, rather than net, pole investment in order to ensure full cost recovery. Due to the inequities in the ratios of net-to-book for total plant investment versus pole investment, full recovery of administrative expenses would not be possible under the Commission's

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<sup>14</sup> NPRM, ¶ 27 and n. 63.



formula without this modification.<sup>15</sup>

Fifth, the calculation of the tax carrying charge and the rate of the return should use the statutory federal income tax rate, rather than federal income taxes paid. Differences in the taxes paid and the tax expense booked in any given year reflect differences in the timing of income and deductions (e.g., through tax deferrals or credits). As such, using taxes paid would not ensure full cost recovery, and could result in significant year-to-year rate differences as deferred taxes become payable. Use of the statutory tax rate smooths rate changes and gives attaching entities greater rate certainty.

#### **IV. The Current Interstate Rate of Return Should Be Used Unless a Different Risk-Adjusted Rate is Justified**

The Commission also seeks comment on the appropriate rate of return to use in calculating maximum pole attachment rates for utilities operating in states that no

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<sup>15</sup> The net-to-book ratios for poles and for total plant are different. As a result, use of net plant to determine the administrative carrying charge factor will result in underrecovery of administrative expenses. For example, NYNEX's net to book ratio for total plant in New York is approximately 50%, while its net to book ratio for poles is approximately 30%. In those circumstances, as the following calculation demonstrates, NYNEX would underrecover 40% of its administrative expenses under the Commission's proposed formula:

Administrative Expenses	\$50
Total Pole Investment	\$1000
Net Pole Investment	<u>\$ 500</u> (50% total plant)
Carrying Charge Factor	10%

Pole Investment	\$1000
Net Pole Investment	<u>300</u> (30% poles)
Administrative Expense	\$ 30 (10% of \$300)
Recovery	

Administrative Expenses	\$ 50
Expenses Recovered	<u>30</u>
Recovery Shortfall	\$ 20

longer regulate utility rates on a rate of return basis.<sup>16</sup> In its Order implementing the local competition provisions of the 1996 Telecommunications Act, the Commission concluded that the currently authorized rate of return at the federal or state level is a reasonable starting point for certain pricing calculations.<sup>17</sup> Where a state regulates pole attachment rates, the Commission has no role to play and that state will determine the appropriate rate of return to use in setting maximum attachment rates, whether the incumbent LEC is regulated on a rate of return or incentive basis. In those cases where the Commission's formula governs because the relevant state has chosen not to regulate pole attachment rates and the parties have been unable to agree on a rate, the currently authorized federal rate of return -- now 11.25% -- should be used unless the incumbent LEC can demonstrate that the business risks it faces justify a different risk-adjusted cost of capital. This rebuttable presumption will minimize disputes concerning the appropriate rate of return in a given state.

#### **V. The NESC Safety Space Should Be Assigned to the Electric Companies**

As the Commission notes, the National Electric Safety Code (NESC) requires a 40 inch safety space between electric and telecommunications lines on a pole to protect cable and communications workers from contact with "potentially lethal" electric power lines.<sup>18</sup> Bell Atlantic and NYNEX agree with the Commission's premise

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<sup>16</sup> NPRM, ¶ 37.

<sup>17</sup> First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-98, 11 FCC Rcd 15499 (1996), ¶ 702.

<sup>18</sup> NPRM, ¶ 19.

that the 40 inch safety space should properly be assigned to the electric utility as part of its usable space, because it is the electric utility's equipment that necessitates creation of the safety space and it is the electric utility's responsibility to comply with that provision of the NESC.<sup>19</sup> No other attaching entity's equipment creates such a safety hazard, and no other attaching party should have to bear the costs of providing that safety barrier. Assignment of the safety space to the electric company as usable space will appropriately increase the percentage of pole costs for which the electric company is responsible and decrease the amount of unusable space per pole.

Both the FCC and those state commissions that have assumed jurisdiction over pole attachment rates, terms and conditions should ensure that assigning the safety space to the electric company does not encourage electric utilities to engage in activities that may jeopardize the NESC safety margins. Faced with a choice between paying to replace an existing pole with a taller pole or to place equipment within the 40 inch safety space, some electric utilities are choosing to squeeze the margin of safety by taking the latter approach. Such actions heighten the risks for cable and communications workers.

## **VI. The Commission Should Reject the Modifications to the Pole Attachment Rate Formula Proposed by the Electric Companies**

A group of electric utility companies proposes three additional modifications to the current pole attachment rate formula.<sup>20</sup> These modifications would

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<sup>19</sup> *Id.*

<sup>20</sup> See American Electric Power Service Corp. *et. al.*, "Just and Reasonable Rates and Charges for Pole Attachments: the Utility Perspective" (Aug. 28, 1996).

(1) exclude poles of 30 feet or less from the calculation of bare pole costs; (2) increase the presumptive pole height to an average of 40 feet; and (3) change the usable space presumption from 13.5 to 11 feet. The Commission should reject all three proposed modifications.

Contrary to the utility companies' claims, poles of 30 feet or less do provide sufficient usable space for multiple attachments. The proof lies in the fact that telephone companies today deploy many thirty foot poles to provide attachments for themselves, electric companies and cable companies.<sup>21</sup> Moreover, with six feet of usable space on a thirty foot pole and no electric company attachments, additional attachments from competing telecommunications providers can be accommodated. The Commission has inquired whether including the cost of these smaller poles in the cost of bare pole calculation would "result in a distorted determination of the actual costs of a bare pole;"<sup>22</sup> in fact, such a distortion would result from excluding the costs of these smaller poles that are actually in use today. The utility companies urge the Commission to ignore the actual infrastructure investment made and maintained by local exchange carriers and adopt a rate formula modification that would disproportionately penalize telephone companies. The Commission should reject this proposed modification.

The telephone industry's continued use of smaller poles that are 30 feet or less in height also requires rejection of the electric utilities' proposal to increase the presumed average pole height to 40 feet. Although the electric utilities may be deploying

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<sup>21</sup> For example, more than 25% of NYNEX's total base of poles are 30 feet or less.

<sup>22</sup> NPRM, ¶ 20.

taller poles to accommodate their own equipment, the average pole height for poles owned by Bell Atlantic continues to be 37.5 feet. The electric companies claim that larger poles are required due to growing demand for space by cable companies and others. Although such demand may grow as competition for local exchange service increases, it has not yet reached levels that require larger poles to accommodate demand. This proposed rate formula adjustment, which would increase the amount of other than usable space, should be made only when there is clear evidence of widespread demand for larger poles; otherwise, attaching entities will be forced to pay higher pole attachment rates than is appropriate after the Commission adopts rules early next year to implement Section 224(e) of the 1996 Telecommunications Act.<sup>23</sup>

Finally, the Commission should reject the electric utilities' proposal to change the usable space presumption from 13.5 feet to 11 feet. That proposal is based on the flawed assumption, discussed above, that the average pole height now is 40 feet. It is also based on the mistaken notion that each telecommunications attachment occupies 2.5 feet. With the increasing use of fiber cable, the need for space for telecommunications attachments on many poles has decreased to a single foot. In addition, the utilities' proposal is premised on changing the minimum ground clearance from 18 to 19.8 feet, in order to allow for cable sag and still have 18 feet of clearance at mid-span. Despite the electric companies' assertions, the NESC does not require 18 feet of ground clearance at mid-span; it only requires 15.5 feet of clearance.<sup>24</sup> Consequently, the existing 18 feet of

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<sup>23</sup> Section 224(e)(2) of the Act requires the costs of the "other than the usable space" on the pole to be allocated equally among all attaching entities in the future. 47 U.S.C. Section 224(e)(2).

<sup>24</sup> See National Electric Safety Code, Section 232B, Table 232-1.

ground clearance in the usable space calculation already accommodates mid-span cable sag. The Commission has previously considered and rejected the argument that the minimum ground clearance should be 19.8 feet rather than 18 feet,<sup>25</sup> and the electric companies have advanced no new arguments or provided new evidence that would give the Commission grounds for revisiting that issue.

## **VII. The Commission Should Adopt Its Proposed Conduit Methodology**

The Commission should adopt its proposed conduit methodology, which is patterned after the half-duct methodology used by the Massachusetts Department of Public Utilities.<sup>26</sup> As the Commission recognizes, measuring the actual duct space occupied by a conduit attachment is likely to be difficult and contentious. Establishing a rebuttable presumption that a cable attacher occupies a half-duct of space “is the simplest and most reasonable approximation of the actual space occupied by an attacher.”<sup>27</sup>

The Commission also appropriately includes in that formula an “adjustment for reserved ducts” reflecting the number of reserved ducts that all conduits users have the right to use in case of a cable break, necessary maintenance or for other appropriate reasons. Given the relatively high initial costs and the sensitive civic considerations associated with opening underground facilities, the long design life of these facilities requires telephone companies to forecast and install the number of ducts

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<sup>25</sup> See Memorandum Opinion and Order, *Petition to Adopt Rules Concerning Usable Space on Utility Poles*, RM 4558, FCC 84-325 (slip. op.) (rel. July 25, 1984).

<sup>26</sup> NPRM, ¶¶ 44-45.

<sup>27</sup> NPRM, ¶ 46.

sufficient to meet anticipated needs for growth and maintenance. If all attaching entities may use these reserved ducts in case of emergency or need for maintenance, they should contribute to the cost of these facilities. The adjustment for reserved ducts in the proposed formula reduces the average number of ducts in the denominator of the occupied space component in the formula, thereby spreading more equitably among all conduit users the costs associated with the shared benefits of these spare facilities.<sup>28</sup>

For the reasons previously outlined with regard to pole attachment rates, the Commission's formula for setting conduit access rates should also use gross, rather than net, book costs. Application of a single rate formula for both poles and conduit will simplify determination and administration of rates, promote certainty, and reduce the potential for rate arbitrage created by application of different formulae. It will also reduce the likelihood of rate disputes.

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<sup>28</sup> Even with the adjustment for reserved and maintenance ducts, the proposed formula does not ensure full cost recovery. Because conduit is designed to be fully occupied only at the end of its design life, a utilization factor should be included.

### **VIII. Conclusion**

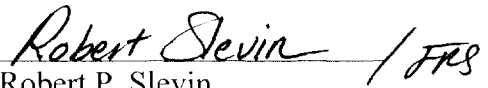
The Commission should adopt the limited proposed modifications to the pole attachment and conduit rate formulas outlined above.

Respectfully submitted,

Edward D. Young III  
Of Counsel

  
Betsy L. Anderson  
1320 North Court House Road  
Eighth Floor  
Arlington, VA 22201  
(703) 974-6348

Attorney for the  
Bell Atlantic Telephone Companies

  
Robert P. Slevin  
1095 Avenue of the Americas  
Room 3731  
New York, NY 10036  
(212) 395-6390

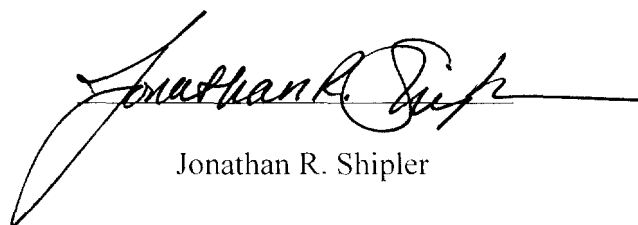
Attorney for the  
NYNEX Telephone Companies

Dated: June 27, 1997



CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 1997, a copy of the foregoing "Joint Comments of Bell Atlantic and NYNEX" was served by first class U.S. mail to the parties on the attached list.

A handwritten signature in black ink, appearing to read "Jonathan R. Shipler", with a long horizontal flourish extending to the right.

Jonathan R. Shipler

\* BY HAND

Michael T. McMenamin \*  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W  
Room 801(B)  
Washington, DC 20554

ITS, Inc.\*  
1919 M Street, NW  
Room 246  
Washington, DC 20554